Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

CRANE CO.,
Petitioner,

v.

UNITED STATES OF AMERICA EX REL. STANLEY RABUSHKA
and STANLEY RABUSHKA,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case concerns the limits of subject matter jurisdiction under the special jurisdictional provisions of the False Claims Act, 31 U.S.C. § 3730(e)(4)(A). Respondent brought a *qui tam* action against Petitioner Crane Co. (or "Crane") under the False Claims Act (or "FCA") alleging that Crane divested its subsidiary, CF&I Steel Corporation ("CF&I"), in a fraudulent scheme to cause the Pension Benefit Guaranty Corporation ("PBGC") to assume CF&I's unfunded pension liability. The district court dismissed the case for lack of subject matter jurisdiction under §3730(e)(4)(A) finding that Respondent's suit was based solely on prior public disclosures of Crane's alleged scheme. A divided panel of the Eighth Circuit reversed the district court. The appellate court, departing from established standards of review, rejected the jurisdictional facts found by the district court and concluded that jurisdiction existed because Respondent's allegations had not been the subject of prior public disclosures.

The questions presented are:

I

Does a district court have subject matter jurisdiction under §3730(e)(4)(A) of the False Claims Act over a *qui tam* suit based on public disclosures that so alerted the PBGC to the likelihood of a false claim, that it began an investigation, even though the public disclosures did not mention fraud explicitly?

II

Are findings of fact of a district court supporting its conclusion that subject matter jurisdiction is lacking subject to review by other than the clearly erroneous standard established in *Anderson v. City of Bessemer City*?

LIST OF PARTIES AND RULE 29.1 LIST

The caption of this petition identifies all parties in the lower court. Petitioner Crane Co. has no parent corporation. Crane has only wholly owned subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

Crane Co. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 40 F.3d 1509 (8th Cir. 1994). It is reprinted in the Appendix ("App.") at 1A-40A. The district court's unpublished opinion and order is reprinted at App. 41B-49B. The court of appeals' order denying Crane's petition for rehearing is not reported and is reprinted at App. 50C.

JURISDICTION

The court of appeals entered its judgment on November 16, 1994. It denied a timely petition for rehearing on January 19, 1995. This Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The statute involved is 31 U.S.C. §3730(e)(4)(A). It is reprinted at App. 51D.

STATEMENT OF THE CASE

In 1985, Crane distributed its ownership interest of CF&I to Crane shareholders as a dividend. More than five years later, on November 7, 1990, CF&I declared bankruptcy due in part to its inability to fund the required annual payments to its pension plan. At the time of its bankruptcy, CF&I had unfunded pension obligations estimated at $140 million. In 1992, following lengthy negotiations with CF&I, the PBGC terminated CF&I's pension plan, thereby triggering the PBGC's statutory obligation to pay covered benefits to CF&I retirees.

Before Respondent Rabushka commenced this suit on February 28, 1991 and beginning as early as 1985, *The Pueblo Star-Journal* and *The Pueblo Chieftain*, newspapers in Pueblo, Colorado, where CF&I's steel mill and most of its employees are located, publicized the underfunding of CF&I's pension plan and Crane's plans for CF&I. Specifically, *The Pueblo Star-Journal* and *Pueblo Chieftain* on May19, 1985 reported:

> One of the concerns that workers, and potential investors, have had is [CF&I's] pension liability, a major cost that no longer will be the responsibility of the much larger Crane Co.

Shortly after Crane's spin-out of CF&I, the media disclosed that Crane's April 3, 1985 pre-spin-out Proxy Statement re-

ported a substantially lower unfunded pension liability for CF&I's pension plan than reported in CF&I's 1986 post-spin-out annual report.

When CF&I filed for bankruptcy, the *Pueblo Chieftain* reported as follows on November 8, 1990:

> CF&I listed $221.6 million in assets against $332.1 million in liabilities, as of a July 31, [1990] financial statement accompanying the bankruptcy petition.
>
> By far the biggest liability is a $140 million underfunding of the pension plan, which CF&I will seek to unload during reorganization.
>
> * * *
>
> The 1982-83 shutdown of CF&I's blast furnaces and coke ovens, ..."created a tremendous number of new retirees now close to 8,000 people receiving pensions."
>
> Before Crane spun CF&I off as an independent company in 1985, the company ordered an actuarial study that showed the pension bill was $19 million a year, triple the previously estimated $6 million.

Furthermore, during a CF&I bankruptcy hearing on December 14, 1990 attended by the PBGC and other creditors, Frank Cummings, counsel for CF&I, stated:

> In addition, there were what we believe to be miscalculations, putting the kindest possible face on it, by the actuary for this plan who was retained by the former parent of the company, Crane. And those miscalculations — it is a pejorative term. Those calculations which did not display what we believe should have been displayed were not discovered until at or about the time of the spin-off which occurred in 1985.

Later in the same bankruptcy proceeding, Crocker Nevin, Chairman of the Board of CF&I, explained:

> The blow came really late in '86 when thanks to very substantial give backs by the union and by the management we were able to save $24 million. We were then presented with the new actuarial findings which showed that our unfunded [pension liability] was around $140 million and our annual [pension contribution] of $17 million was [increased to] $19 million.

From this and other evidence, the district court found that the "significant transactions which underlie Respondent's FCA claim were disclosed in the media prior to Respondent's filing of this suit." App. at 46B. The district court also found that Frank Cummings, counsel for CF&I, essentially made an allegation of actual fraud during CF&I's bankruptcy proceedings. App. at 47B.

In addition to these disclosures mentioned specifically by the district court, the record below contains evidence of other disclosures preceding Respondent's suit. For example: (i) in 1985, the Securities Exchange Commission ("SEC") explored Crane's desire to avoid liability for CF&I's pension obligation during the course of an unrelated investigation of suspected insider trading;[1] (ii) by 1990, the news media reported CF&I and PBGC to be negotiating the termination of the CF&I pension plan; (iii) CF&I declared bankruptcy because of its inability to avoid its underfunded pension obligations; (iv) the cause of this substantial underfunding was explored extensively in the bank-

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[1] These depositions are "public", as defined by the Act because they are part of a criminal, civil or administrative hearing. They are also public in a practical sense because, after the conclusion of an SEC investigation, such transcripts are available via a Freedom of Information Act request. In this case, the SEC investigation terminated in 1986 and, from that date forward, the transcripts were actually available to the public.

ruptcy court. Most importantly, the PBGC began investigating Crane's potential liability for CF&I's pension plan obligations prior to the time Respondent filed his first complaint.

COURSE OF PROCEEDINGS AND DISPOSITION BELOW

Respondent brought two actions against Crane and its former subsidiary, CF&I, under the False Claims Act ("FCA" or the "Act"), 31 U.S.C. §§3729-31.[2] Respondent's initial suit, filed February 28, 1991, was dismissed by the district court as premature. Respondent appealed. During the pendency of the appeal, the matter ripened when the PBGC terminated CF&I's pension plan and assumed responsibility for the insured portion of CF&I's unfunded pension liability. Before the Eighth Circuit remanded, Respondent filed on March 20, 1992 a second complaint that included the additional allegations concerning the actions of the PBGC. The district court consolidated these cases.

The United States did not intervene as permitted by 31 U.S.C. §3730. Crane moved to dismiss for lack of subject matter jurisdiction under 31 U.S.C. §3730(e)(4)(A) because the complaint was based on allegations and transactions that were publicly disclosed in the news media and in bankruptcy proceedings. The district court granted Crane's motion, dismissing Respondent's claim. Respondent sought reconsideration of the district court's order and also sought to amend his complaint. The proposed amendment did not allege any additional facts from which the district court could find jurisdiction under §3730. The district court denied both motions and Respondent appealed to the Eighth Circuit.

The court of appeals reversed the district court, finding that the publicly disclosed information was not sufficient to invoke the

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[2] CF&I is in bankruptcy under Chapter 11 of the Bankruptcy Code and, therefore, was not served with process.

jurisdictional bar provisions of the False Claims Act because the publicly disclosed transactions or allegations "do not encompass the essential element of the fraud alleged in Respondent's complaint." App. at 9A. In his dissenting opinion, Judge Magill agreed with the district court and wrote that the majority opinion "frustrates the intent of Congress and ignores the lessons of history by opening wide the floodgates for the very 'second toots' and parasitic lawsuits that Congress sought to prevent" by the jurisdictional bar provision, 31 U.S.C § 3730 (e)(4)(A). App. at 9A. Judge Magill further argued that the majority had seriously misapplied and misconstrued the principal case relied on by the majority, *United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645 (D.C. Cir. 1994). Nevertheless, Crane's requests for rehearing and for rehearing en banc were denied.

REASONS FOR GRANTING THE WRIT

In direct conflict with five other circuits, the Eighth Circuit has found subject matter jurisdiction of a *qui tam* suit where ample public information existed to alert the PBGC to the likelihood of the false claim alleged. The Eighth Circuit came to this conclusion by ignoring this Court's decision in *Anderson v. City of Bessemer City* and apparently reviewing *de novo* the district court's findings of fact as to its lack of jurisdiction. *Bessemer City* requires that appellate courts make that review using the clearly erroneous standard.

If not reviewed and reversed by this Court, the Eighth Circuit's decision will open the federal courts to anyone alleging a false claim unless public disclosures exist that reveal fraud so patent that no innocent interpretation is plausible. Broadening *qui tam* jurisdiction in this fashion will frustrate Congressional efforts to limit private FCA actions to those brought by true "whistleblowers."[3]

I. The Eighth Circuit's Interpretation Of §3730(e)(4)(A) Conflicts With Five Other Courts of Appeals

The court of appeals adopted what it understood to be the reasoning of *United States ex rel. Springfield Terminal Ry v. Quinn*, 14 F.3d 645 (D.C. Cir. 1994). That understanding led to the conclusion that §3730(e)(4)(A) did not bar Respondent from bringing this action because "the essential elements comprising that fraudulent transaction [had not] been publicly disclosed so as to raise a reasonable inference of fraud." App. at 8A. In so holding, the Eighth Circuit:

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[3] A "whistleblower" is, in the words of *Wang v. FMC Corp.*, 975 F.2d 1412, 1419 (9th Cir. 1992), one who "sounds the alarm," not one who "republishes an allegation that already has been publicly disclosed."

- erroneously extended *Springfield* by limiting application of the public disclosure bar to circumstances in which either (i) the public allegation is one of "fraud" in *haec verba*, or (ii) the publicly disclosed facts, from which an inference of fraud may be drawn, are not susceptible of any innocent explanation; and

- selectively analyzed the facts in the record by ignoring the public disclosures, including a bankruptcy proceeding to which the PBGC was a party, that in the aggregate placed the PBGC on actual notice of a potential false claim and caused the PBGC to initiate an investigation;

In a thorough dissent ("Dissent"), Judge Magill fully analyzed how the Eighth Circuit misinterpreted the FCA and misapplied *Springfield* in this case. The panel's opinion plainly conflicts with the jurisdictional limits of the FCA established by *Springfield* and the well-reasoned decisions of the Second[4], Third[5], Ninth[6] and Tenth[7] Circuits. As articulated in those cases, only bona fide whistleblowers meet the jurisdictional requirements to prosecute *qui tam* actions, while "second toots" who allege facts

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[4] *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318 (2d Cir. 1992)(*qui tam* suit barred when based on allegations disclosed during government investigation).

[5] *United States ex rel. Stinson v. Prudential Insurance Co.*, 944 F.2d 1149 (3rd Cir. 1991)(law firm's *qui tam* suit barred when based on information gained in discovery).

[6] *Wang v. FMC Corp.*, 975 F.2d 1412 (9th Cir. 1992)(*qui tam* suit barred if relator has no hand in the public disclosure of the allegations).

[7] *United States ex rel. Precision Co. v. Koch Indus.*, 971 F.2d 548 (10th Cir. 1992), *cert. denied*, 113 S.Ct. 1364 (*qui tam* suit barred when based on allegations disclosed in civil suit, Senate hearings, and news reports).

or make allegations cumulative to those already publicly disclosed are barred.[8]

Although the panel below may have sought to follow *Springfield*, its holding goes far beyond that of the District of Columbia Circuit. As the Dissent demonstrates, the majority opinion devitalizes the public disclosure bar to a point where few, if any, *qui tam* actions are barred.

In *Springfield*, in contrast to the facts in this case, the public disclosures pointed only to innocent activity. They provided no clue of potential false claims and no basis for government investigative activity. Only the whistleblower's information revealed the potential false claim.

Here, the district court found that the essential facts of the false claims being alleged were sufficiently disclosed in newspapers and court proceedings so that no jurisdiction existed by virtue of the restriction of §3730(e)(4)(A). App. at 47B. The appellate panel undermined those trial court findings by postulating alternative explanations consistent with innocent activity. Since it could infer an innocent explanation from those publicly disclosed facts, the panel concluded that an "uninitiated reader" was not alerted to potential fraud. App. at 8A. That finding extended *Springfield* well beyond its holding and severely distorted the application of the public disclosure bar in future cases. If public disclosures of fraud must unequivocally disclose fraud to the uninitiated before the public disclosure bar applies, then the provisions of §3730(e)(4)(A) will fall into disuse. An "uninitiated reader" will almost certainly find facts relevant to potential fraud

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[8] The First and Fourth circuits have a contrary interpretation of §3730(e)(4)(A). *See United States ex rel. Prawer v. Fleet Bank*, 24 F.3d 320 (1st Cir. 1994) (*qui tam* suit not barred if it provides an appropriate return to the government); *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339 (4th Cir.), *cert. denied*, 115 S.Ct. 316 (1994) (*qui tam* suit not barred unless it is derived from a previous disclosure).

to be either meaningless or subject to innocent, though implausible, explanations.[9]

The purpose of the public disclosure bar is not as the appellate court holds, to bar only those suits where the disclosed fraud is apparent to the "uninitiated." App. at 8A. Section 3730(e)(4)(A) denies jurisdiction to FCA actions based on publicly disclosed information that is sufficient to warrant an investigation into potential fraud. *Springfield*, 14 F.3d at 1520. Much fraud against the government is factually complex and, even if fully disclosed, would not necessarily reveal itself to a layman. In such complex cases, the appellate court's holding would render the public disclosure bar completely inoperative.

The presence in the public record of facts which may have innocent explanations does not render a trial court finding of disclosure of fraud clearly erroneous. An inquiry notice standard is consistent with the disclosure of equivocal information. Under this criterion, the critical element is that the public revelations provide notice of potential fraud, not whether the revelations are unexplainable or point only in the direction of liability.

The public disclosures in this case may have innocent explanations, as the court of appeals points out. The record before the district court, however, reveals not only the two conflicting "states of fact" required by *Springfield* but also both a possible motive for Crane along with an opportunity to act.[10] While these disclosures do not establish wrongdoing by Crane, they are certainly adequate to put the PBGC on notice of the need for an

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[9] Ironically, under the appellate court's interpretation, the more flagrant its fraud and the more bereft of innocent explanations for its conduct, the more likely a defendant is to escape a *qui tam* action if even minimal disclosures occur. The honest defendant, however, saddled with innocent or equivocal disclosures, will be forced to defend the action.

[10] This case is not yet at issue. If answer should ever be required, Crane will deny any fraudulent activity.

investigation. That these disclosures were adequate for the purpose is conclusively evidenced by the fact the PBGC's investigation was already underway when Respondent filed suit. App. at 31A.

As the Dissent points out in extensive quotes from the media, the testimony in an SEC investigation and proceedings in bankruptcy court, the public disclosures lay out all the elements of the fraud alleged by Respondent. App. at 31A. These disclosures were not lost on the PBGC, which possesses a far greater sophistication than the uninitiated general public in matters relating to pension funds. The PBGC had adequate notice of Crane's widely publicized conduct long before Respondent's first FCA claim and initiated its own investigation. This is not the circumstance in which Congress intended a *qui tam* plaintiff to proceed.

Since its enactment in 1863, the FCA has barred a *qui tam* action whenever the government had prior inquiry notice of the potential fraud. *See Pettis ex rel. United States v. Morrison-Knudson Co.*, 577 F.2d 668 (9th Cir. 1978). Although the FCA was amended in 1986, those amendments did not change the scope of the inquiry notice bar. Rather, the 1986 amendments rectified the injustice represented by *United States ex rel. Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir. 1984). In *Dean*, a whistleblower was barred by its own act of reporting fraud to the government. To remedy this unfair result, Congress broadened FCA jurisdiction by carving out a safe harbor for the "original source" of information about potential fraud. 31 U.S.C. §3730 (e)(4)(B). Simultaneously, it restricted jurisdiction by barring suits (other than by original sources) whenever the government was on constructive inquiry notice of possible fraud as the result of a "public disclosure." 31 U.S.C. §3730 (e)(4)(A).

As the Dissent points out, these changes did nothing to abrogate the inquiry notice standard established by *Pettis*. In

fact, *Springfield* itself acknowledges the vitality of this criterion. 14 F.3d at 655-56.

The Eighth Circuit's opinion seems to be based on a policy of encouraging greater private prosecution of potential government fraud. The legislative history demonstrates that this zeal for expanded litigation under the FCA is misplaced. Congress debated in 1943 and again in 1986 the competing policies of ferreting out government fraud and discouraging "parasitic" suits. In each instance, Congress elected to constrain *qui tam* jurisdiction.[11] S. REP. No. 345, 99th Cong., 2d Sess. at p. 11, 30 *reprinted in* 1986 U.S.C.C.A.N. 5276, 5295.

The powerful enforcement arms of today's government do not require the 10,000 attorneys general envisioned by the Lincoln administration. *Id.* at p. 11. Today's government needs whistleblowers to break "the conspiracy of silence" surrounding undisclosed fraud. *Id.* at p. 11. This case does not present such a conspiracy of silence. Where the clear possibility of false claims is publicly disclosed, the government can investigate. In that event, the *qui tam* plaintiff may hinder more than help.

The Court should clarify the purpose of the FCA and resolve the conflict among the circuits about the scope of §3730(e)(4)(A).

II. The Court Of Appeal's Determination of Federal Subject Matter Jurisdiction By An Apparent De Novo Review Of The District Court's Findings Is Contrary to *Anderson v. City of Bessemer City*

This Court has established an unequivocal standard of review to be applied by the courts of appeal when reviewing factual

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[11] As the Dissent points out, the appellate court's expansive gloss on *Springfield* is also contrary to the presumption against jurisdiction. *See, United States ex rel. Precision Co. v. Koch*, 971 F.2d 548, 552 (10th Cir. 1992), *cert. denied*, 113 S.Ct. 1364 (1993).

determinations. Where a district court makes factual determinations, regardless of whether the facts are disputed, the appellate court must review those findings under the clearly erroneous standard. *Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985). Absent a finding of clear error, the appellate court may not substitute its judgment for that of the district court. This well-established law mandates that such a substitution is inappropriate. *See Favors v. Fisher*, 13 F.3d 1235, 1238 (8th Cir. 1994) ("Where two permissible views of the evidence exist, the district court's choice between them cannot be clearly erroneous. *Anderson*, 470 U.S. at 574").

Legal issues decided by a district court in determining its subject matter jurisdiction are to be reviewed *de novo*. *United States v. Northrop Corp.*, 5 F.3d 407, 409 n.5 (9th Cir. 1993), *cert. denied*, 114 S.Ct. 1543 (1994). However, when a district court decides material issues of fact in making a determination of its subject matter jurisdiction, the appellate court must review those findings only for clear error. *Drevlow v. Lutheran Church, Missouri Synod*, 991 F.2d 468, 470 (8th Cir. 1993); *Northrop Corp.*, 5 F.3d at 409 n.5, *cert. denied*, 114 S.Ct. 1553 (1994).

The district court resolved several key factual issues in its determination that it lacked subject matter jurisdiction. Although the evidence submitted was documentary and not contradicted in any material respect, the interpretation of the evidence was hotly contested. When a district court chooses among disputed inferences from uncontradicted facts, its findings are entitled to review under the clearly erroneous standard. *Commissioner of Internal Revenue v. Duberstein*, 363 U.S. 278, 291 (1960). *See also Sheehan v. Gustafson*, 967 F.2d 1214 (8th Cir. 1992).

The district court found that "the significant transactions which underlie Rabushka's FCA claim were disclosed" prior to Rabushka's filing his complaint. App. at 46B. The district court further found that "an actual allegation of fraud was essentially

made in December by Frank Cummings, counsel for CF&I." App. at 47B. The district court's findings that the publicly-disclosed facts and circumstances are substantially the same facts and circumstances alleged in Rabushka's complaint are the findings of fact subject to the clearly erroneous standard of review.

Without discussion of the standard of review, the court of appeals disagreed with those findings and made findings of its own. Apparently the appellate court reviewed the facts *de novo* and then substituted its own judgment for that of the district court. The Eighth Circuit second-guessed the district court's findings without ever making a determination that those findings were clearly erroneous and in contravention of the appropriate standard of review.

The appeals court's departure from settled authority is most apparent with respect to its treatment of the statement of Frank Cummings, CF&I's counsel, made in the bankruptcy proceeding. "[T]he district court viewed this statement as tantamount to a public allegation of fraud" which was itself sufficient to bar subject matter jurisdiction. App. at 4A. In reversing the district court, the appellate court disagreed with that factual finding, writing "although [Cummings' statement is] hardly complimentary, [it] is by itself insufficient to rise to the level of a public allegation of fraud on the part of Crane." App. at 4A. Although other fact finders may differ about the meaning of Mr. Cummings' statement, the finding was not clearly erroneous. The Eighth Circuit simply usurped the fact-finding role of the district court.

The court of appeals made other substitutions of its findings of fact for those of the district court. App. at 5A-8A. The appellate court examined several items of evidence from which the district court made the factual determination that public disclosures of the facts on which Rabushka's claims are based occurred before Rabushka filed his lawsuit. In each instance, the

appellate court made its own determination of the facts and inferences drawn from those facts. Just like its treatment of Mr. Cummings' statement, the court of appeals apparently applied a *de novo* standard of review and reversed the district court's findings without any indication that those findings were clearly erroneous.

The Eighth Circuit's departure from the standard of review established in *Anderson v. City of Bessemer City* threatens to erode appellate court deference to the factual findings of trial courts. This case presents the Court with a significant opportunity to restore the validity of *Bessemer City*.

CONCLUSION

For the foregoing reasons petitioner respectfully requests that this Court grant a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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